ATTACHMENT 12 TO SUPPLEMENTAL DECLARATION OF C. MICHAEL PFAU AND JULIE S. CHAMBERS

ORIGINAL

EX PARTE OR LATE FILED

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RECEIVED

DEC 17 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 17, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., SW, Room TWB-204
Washington, DC 20554

Re: Notice of Ex Parte Contact
In the Matter of the Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295

Dear Ms. Salas:

On Friday December 10, 1999, the Commission issued a Public Notice in the aforementioned proceeding requesting Comment on Bell Atlantic's proposal to create a separate affiliate for the provision of xDSL services in New York. Attcahed hereto please find AT&T's Response to that Public Notice.

Two copies of this Notice are being submitted in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

Robert W. Quinn, Jr.

Attachments

cc: The Honorable Chairman William E. Kennard
Dorothy Attwood, Legal Adviser to Chairman Kennard
The Honorable Commissioner Tristani,
Sarah Whitesell, Legal Adviser to Commissioner Tristani
The Honorable Commissioner Ness
Jordan Goldstein, Legal Adviser to Commissioner Ness
The Honorable Commissioner Furchgott-Roth
Helgi Walker, Legal Adviser to Commissioner Furchgott-Roth
The Honorable Commissioner Powell
Kyle Dixon, Legal Adviser to Commissioner Powell
Lawrence Strickling, Common Carrier Bureau
Robert Atkinson, Common Carrier Bureau
Bill Bailey, Common Carrier Bureau
Carol Mattey, Common Carrier Bureau
Michele Carey, Common Carrier Bureau
Andrea Kearney, Attorney, Common Carrier Bureau

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COMMENTS OF AT&T CORP.
IN RESPONSE TO THE COMMISSION'S
DECEMBER 10, 1999 REQUEST FOR EX PARTE RESPONSES
TO BELL ATLANTIC'S ADVANCED SERVICES AFFILIATE PROPOSAL

INTRODUCTION AND SUMMARY

AT&T respectfully submits these comments in response to the Commission's Public Notice of December 10, 1999,[1] which requests responses to Bell Atlantic's *ex parte* submission expressing its willingness to establish, six months from now, a wholly owned affiliate to provide advanced services in New York. Although Bell Atlantic also claims in this submission to be "already in compliance" with its obligations under section 271, it protests too much. The record shows overwhelmingly that Bell Atlantic does not yet provide CLECs with nondiscriminatory access to the services and facilities they need to offer advanced services. Bell Atlantic would have no reason to submit an *ex parte* at the eleventh hour proposing a new corporate form for its advanced services business if these facts were otherwise.

For several independent reasons, both procedural and substantive, the Commission should not accord this submission any weight for any purpose. First, the submission conveys nothing more than a promise of future action. The Commission has repeatedly emphasized, and the statute requires, that such promises be given no weight in assessing whether a BOC has proved that it is in compliance with all of the requirements of section 271. Second, the submission was filed long after the date for reply comments, which is the absolute cut-off date for new factual evidence under the complete-when-filed requirement. Indeed, the number, complexity, and

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[1] Public Notice, *Ex Partes* Requested In Connection With Bell Atlantic's Section 271 Application for New York, CC Docket No. 99-295, DA 99-2779 (rel. Dec. 10, 1999) ("Public Notice").

uncertainty of the legal and factual issues that the submission raises make this belated proposal a textbook example of the need for this Commission to enforce that requirement.

Third, Bell Atlantic's purported justification for the submission – that it is merely offering to do what the Commission has already said was sufficient in the SBC/Ameritech Merger Order[2] – is false. Bell Atlantic expressly refuses to comply with many of the merger order conditions related to a data affiliate, including most notably all of the conditions related to OSS parity. Moreover, even if it were committing to all of the conditions, the Commission's explicitly non-precedential order, by its terms, provides no basis for foregoing here an independent and comprehensive analysis of Bell Atlantic's proposal that is as a precondition to giving it any weight.

Finally, the terms for the affiliate that Bell Atlantic proposes are entirely inadequate to demonstrate that Bell Atlantic, in the future, will provide access to advanced services on a nondiscriminatory basis. The proposal is silent on the very issues of loop information and provisioning that underlie Bell Atlantic's current non-compliance with section 271. Far from bringing Bell Atlantic into compliance, accepting Bell Atlantic's proposal would enable Bell Atlantic to perpetuate and leverage indefinitely its enormous advantage over competitors in the advanced services market.

I. BELL ATLANTIC'S PROMISE TO CREATE A SEPARATE DATA-AFFILIATE IN SIX MONTHS IS ENTITLED TO NO WEIGHT

In a letter from Thomas J. Tauke to Chairman Kennard dated December 10th, 1999 ("BA Letter"), Bell Atlantic promises to establish a separate data affiliate if required to do so.

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[2] In re Applications of Ameritech Corp. and SBC Communications, Inc., CC Docket No. 98-141 (Oct. 8, 1999) ("SBC/Ameritech Merger Order").

Specifically, Bell Atlantic states that it "is willing to establish" a separate affiliate to provide xDSL services "on the same substantive terms that the Commission recently approved in the context of the SBC/Ameritech Merger Order, subject to limitations and clarifications noted in an attachment. BA Letter at 2. Bell Atlantic's letter thus introduces into the record another promise of future performance.

This Commission, however, has previously and repeatedly refused to give any weight to "a BOC's promises of future performance." Ameritech Michigan Order ¶ 55; see *id.* ¶¶ 179, 251-52; Second BellSouth Louisiana Order ¶ 56 n.18; BellSouth South Carolina Order ¶ 38; see also UNE Remand Order ¶ 271 & nn.539, 541 ("assertions regarding future performance are inherently unsupportable"). This refusal flows directly from the express statutory requirements of section 271. Section 271 requires proof that the applicant BOC "is providing" and has "fully implemented" "each" item of the competitive checklist. 47 U.S.C. §§ 271(c)(2)(A), (c)(2)(B), (d)(3)(A)(i); see also *id.* § 160(d) ("the Commission may not forbear from applying the requirements of Section 251(c) or 271 . . . until it determines that those requirements have been fully implemented"). Given these requirements, it follows directly that "a BOC's promises of *future* performance . . . have no probative value in demonstrating its *present* compliance with the requirements of section 271." Ameritech Michigan Order ¶ 55 (emphasis in original).

As discussed below, Bell Atlantic's performance in support of CLECs' requests for xDSL loops has been and continues to be commercially unreasonable and insufficient to support a competitive market. This is evident both from the data submitted by various CLECs that have had difficulty with Bell Atlantic's support processes and from the Department of Justice's Evaluation (p. 26). The Department found not only that Bell Atlantic's pre-ordering process were

lacking but also that "[t]here are serious unresolved issues relating to [Bell Atlantic's] DSL ordering and provisioning processes." *Id.* Bell Atlantic's promise to take the additional action of establishing a separate data affiliate is therefore inadequate -- on its face -- to demonstrate present compliance with section 271. To the contrary, it proves that the application is premature. As the Commission previously made clear, if a BOC concludes after filing its application that "additional actions must be taken" to demonstrate compliance, "then the BOC's application is premature and must be withdrawn." *Id.*

Nowhere in its letter to the Commission does Bell Atlantic even attempt to explain why this fundamental rule should not apply. Instead, Bell Atlantic tries to pretend that this proposal is not necessary to show compliance at all. According to Bell Atlantic, it is "*already in compliance* with the checklist today" with respect to xDSL; this promise is just a way to "ensure that competing providers *continue* to receive non-discriminatory access to services and facilities." BA Letter at 1 (emphasis added). This careful positioning of the issue is highly significant. It illustrates that even Bell Atlantic is not contending that this promise could be relied upon to patch up a deficiency in its prior showing with respect to xDSL. Instead, the most Bell Atlantic claims is that this promise is a kind of insurance policy of continued non-discriminatory performance. If the Commission does not agree with Bell Atlantic's premise (that it has already shown full implementation), then Bell Atlantic's new promise is worthless, because not even Bell Atlantic contends that this new promise can be relied upon to make up for the defects in that prior showing.

Indeed, this promise, by its very terms, does not and cannot be relied upon as evidence that any problem of less-than-full implementation of the checklist with respect to xDSL services

and facilities has been fixed as of today. That is because Bell Atlantic's promise refers to an action that will take effect not today, not tomorrow, but six months from now at the earliest. Bell Atlantic commits only to "complete the transition period" to establish a separate data affiliate "by July 1, 2000 unless necessary state regulatory approvals have not been obtained." BA Letter, Att. ¶ 4. Thus, even assuming (contrary to what we show below) that establishing the separate data affiliate Bell Atlantic proposes could lead to the non-discriminatory provision of access to xDSL facilities and services, any such beneficial impact is at least six months away. This particular promise, therefore, is inherently incapable today of making up for any failure in Bell Atlantic's application to prove that it has fully implemented its duty to provide nondiscriminatory and commercially reasonable access to xDSL facilities and services.

Bell Atlantic's promise is also inadequate to satisfy its burden of proving that its authorization to provide long-distance is in the public interest. In its Evaluation, the Department of Justice concluded that Bell Atlantic "has not yet demonstrated that it can adequately provide access to unbundled local loops . . . for digital subscriber line (DSL) technology" (Eval. at 2) and that this was a significant reason why Bell Atlantic had not demonstrated that it had taken all "of the actions needed to achieve a fully and irreversibly open market in New York." *Id.* at 1; *see id.* at 23-28. The Department's standard is one to which the Commission must give substantial weight, and that is particularly true, as the Commission has expressly recognized, in the Commission's assessment of the public interest. *See* Ameritech Michigan Order ¶ 383. Bell Atlantic's promise to make changes six months from now is inadequate, on its face, to demonstrate that Bell Atlantic's application overcomes the Department's conclusion that its poor performance today means that authorization today is not in the public interest.

In sum, Bell Atlantic's promise to create a separate affiliate is either unnecessary to show compliance with section 271 (as Bell Atlantic maintains in its letter), or is inherently incapable of showing compliance today with section 271 (because it is a promise that takes effect six months from now at the earliest). Either way, the promise is entitled to no weight. The Commission should therefore enforce its longstanding bar against giving weight to promises of future "actions to be taken." Ameritech Michigan Order ¶ 55.

II. BELL ATLANTIC'S BELATED PROMISE VIOLATES THE COMPLETE-WHEN-FILED REQUIREMENT

Bell Atlantic's proposal must also be disregarded for a second important reason: it was not raised in Bell Atlantic's initial application. Indeed, it was not raised even in Bell Atlantic's reply comments, when Bell Atlantic purported to respond to the extensive comments provided by CLECs and by the Department of Justice that demonstrated pervasive discrimination in Bell Atlantic's provisioning of access to xDSL facilities and services.[3] Bell Atlantic said nothing about this promise until December 10, 1999, which was Day 72 of the 90-day comment period, and a mere seven days before the prohibition of all *ex parte* communications with the Commission.[4]

The Commission has stated emphatically that "under no circumstance is a BOC permitted to counter any arguments with new factual evidence *post-dating* the filing of the comments" and that "such evidence, if submitted, will not receive any weight." Ameritech Michigan Order ¶ 51. Bell Atlantic's submission of a letter, containing a brand-new promise of future action and an

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[3] *See, e.g.*, DOJ Eval. at 23-28; Covad Comments at 15-16; NorthPoint Comments at 6-18 & Att. B; Rhythms Comments at 21-22.

[4] Public Notice, Commission Announces Prohibition on Ex Parte Presentations In Connection With Bell Atlantic's Section 271 Application For New York Effective December 17, 1999, DA 99-2838 (rel. Dec. 16, 1999).

attachment describing terms and conditions governing those future actions, is without doubt a submission of "new factual evidence." It is therefore entitled to no weight.

Once again, Bell Atlantic's *ex parte* submission does not even attempt to reconcile the belated submission of this new commitment with the complete-when-filed requirement. Nor is there any basis for an exception to the rule in this instance. Each of the three reasons that underlie the complete-when-filed rule apply here. Indeed, this submission provides the most compelling example to date of the vital need for this Commission to enforce its complete-when-filed requirement.

First, it would be extraordinarily "unfair to third parties" (Ameritech Michigan Order ¶ 52) for the Commission to give any weight to Bell Atlantic's proposal. This proposal raises a host of important and difficult issues on which no third party, including AT&T, can adequately comment with only one week's notice. For example, as discussed in Part III below, Bell Atlantic expressly refuses to commit to a number of the terms and conditions that are binding on SBC/Ameritech. This fact alone means that Bell Atlantic's *ex parte* is not a mere "me-too" commitment, but a new and complicated proposal raising substantial questions not only about what it contains but about what it leaves out. Similarly, as discussed in Part IV, the suggestion that a BOC can lawfully meet its nondiscrimination duties under section 251(c)(3) by creating a wholly-owned separate affiliate not subject to all of the requirements of section 272 itself raises a number of significant legal and practical issues, most of which only can be identified, but not fully addressed, under the circumstances here.

Further, Bell Atlantic's proposal is incomplete in fundamental ways. For example, Bell Atlantic's sketchy proposal provides no description of the terms and conditions on which Bell

Atlantic's new affiliate will obtain access to pre-ordering information or will receive loop provisioning. The proposal also lacks any description of the form or structure of the affiliate; indeed, Bell Atlantic does not even commit to file its application for certification with the New York Public Service Commission (which presumably would contain such information) until December 20, 1999 (see BA Letter, Att. 2 ¶ 2) – three days after the close of all *ex parte* comments in this proceeding. Thus, Bell Atlantic's inadequate disclosure and tardy filing denies CLECs any opportunity whatsoever to comment on the details of the affiliate that Bell Atlantic would create.

Second, giving weight to Bell Atlantic's proposal "'would impair the ability of the state commission and the Attorney General to meet their respective statutory obligations.'" Ameritech Michigan Order ¶ 53. This is particularly true here, where the Department of Justice devoted a substantial portion of its Evaluation to its assessment that CLECs do not "currently have access to DSL loops necessary for them to compete effectively." DOJ Eval. 28; *see id.* at 23-28. For the Commission to conclude that Bell Atlantic's new proposal was sufficient to overcome the Department's concerns when the Department had not been given a chance to evaluate that proposal in light of CLEC concerns would effectively deny the Department the ability to carry out its statutory role.

Third, the Commission has "neither the time nor the resources" meaningfully to evaluate Bell Atlantic's proposal. It will receive comments from third parties on the proposal on December 17th, 1999, the same day that the period for *ex parte* comment closes, and only days before its written decision is due for release. In the very short amount of time that remains, and given the Commission's inability even to receive further *ex parte* presentations on Bell Atlantic's proposal

and the complexity and novelty of the issues raised, the Commission cannot realistically provide a meaningful written determination of the effect of Bell Atlantic's proposal on its compliance with the requirements of section 271.

In short, all of the reasons for the complete-when-filed requirement and the concomitant bar on post-reply comment submissions of new factual evidence apply with particular force to this late submission. There is no reason to exempt it from the Commission's rules, and Bell Atlantic has offered none. For this reason as well, Bell Atlantic's separate data-affiliate proposal should be disregarded.

III. The SBC/Ameritech Merger Order Provides No Support For This Proposal

Bell Atlantic's proposal also cannot be defended on the ground that it seeks merely to implement a structural solution that this Commission has already approved. First, Bell Atlantic's attempt to rely on the conditions in the SBC/Ameritech merger proceeding is improper as a matter of law. The conditions were "designed to address potential public interest *harms specific to the merger*." SBC/Ameritech Merger Order ¶ 357 (emphasis added); *id.* ¶¶ 356-61. They were expressly not intended to have "precedential effect in any forum." *Id.*, App C, n.2. In particular, "[t]he conditions [we]re [not] designed to address . . . the criteria for BOC entry into the interLATA services market." *Id.* ¶ 357. Their approval is therefore immaterial to the concerns presented by Bell Atlantic's section 271 application.[5]

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[5] Reliance solely on the advanced services conditions in the SBC/Ameritech Merger Order is also improper for another fundamental reason: they are not nearly adequate to prevent discrimination against competing xDSL providers. That is evident from comments on the proposed conditions submitted by third parties (including AT&T, see Attachments 4-5) and from the Commission's Order, which expressly states that the conditions are not to be "considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271, and 272. . . . [The conditions] are intended to be a floor, not a ceiling." SBC/Ameritech Merger Order, ¶ 357.

Second, Bell Atlantic has not even committed to implement all of the merger conditions relevant to a data affiliate. Bell Atlantic states that it is "willing to establish [a separate advanced services] affiliate on the *same substantive terms* that the Commission recently approved in the context of the SBC/Ameritech [Merger] Order." See BA Letter at 2 (emphasis added). But that statement is misleading. Bell Atlantic has not in fact agreed to abide by "the same substantive terms" in those merger conditions. Rather, Bell Atlantic's proposal is heavily qualified and subject to numerous "exceptions" and "clarifications." See *id.* In fact, Bell Atlantic is unwilling to commit to some of the six advanced services conditions that apply to SBC/Ameritech, including, most notably, the conditions relating to OSS parity. Its current proposal, therefore, is woefully inadequate, and could not possibly prevent it from discriminating in favor of its affiliate.

Specifically, Bell Atlantic commits only to meeting Conditions I and II (Paragraphs 1-14) of the SBC/Ameritech merger conditions. Condition I sets forth separation requirements between the incumbent LEC and its xDSL subsidiary; Condition II provides for discounted charges for line sharing. See SBC/Ameritech Merger Order ¶¶ 363-70, App C, ¶¶ 1-14. But the SBC/Ameritech Merger Order included additional advanced services conditions, including:

- Condition III, "Advanced Services OSS," which requires SBC/Ameritech to, *inter alia*, "develo[p] and deplo[y] enhancements to its existing [OSS] interfaces" used with xDSL services throughout its territory according to a specified schedule and subject to monetary penalties for noncompliance. In addition, until those interfaces are implemented, SBC/Ameritech must offer CLECs a 25 percent discount from recurring and nonrecurring charges for unbundled loops used for xDSL services. (see *id.* ¶¶ 371-72, App. C, ¶¶ 15-18);

- Condition IV, "Access to Loop Information for Advanced Services," which requires SBC/Ameritech to provide information regarding its loops "without regard to the information that is available to SBC/Ameritech's retail operations" (*id.* ¶ 373. App. C, ¶¶ 19-20);

- Condition VI, "Non-discriminatory Rollout of xDSL Services," which requires SBC/Ameritech to "target their deployment of xDSL services to include low income groups in rural and urban areas" (*id.* ¶ 376, App. C, ¶ 22).

Bell Atlantic's proposal would fully exempt it from the terms of these conditions. Accordingly, Bell Atlantic is *not* "willing" to accept all of the "same substantive terms" that apply to SBC/Ameritech.

If Bell Atlantic refuses to accept all of the terms of the merger conditions, then there is no basis to claim that the Commission's previous "non-precedential" approval of SBC/Ameritech's separate subsidiary should also apply to its proposal. Yet that is precisely what its *ex parte* attempts: it relies on the Merger Order to assert that "establishing a separate affiliate 'ensures a level playing field'" and that "*[t]his Commission has previously concluded as much.*" (Tauke 12/10 Letter at 1 (quoting SBC/Ameritech Merger Order ¶ 363) (emphasis added)); *id.* ("The same is true here."). In fact, the Commission has never addressed whether a data affiliate would create the sort of "level playing field" required by section 251, nor has it addressed a data affiliate subject only to the limited conditions to which Bell Atlantic will accede. The SBC/Ameritech Merger Order thus does not support this proposal, nor justify any truncated review of it.

IV. BELL ATLANTIC'S PROPOSED DATA AFFILIATE, IF ESTABLISHED, WOULD NOT SATISFY BELL ATLANTIC'S NONDISCRIMINATION DUTIES UNDER SECTION 271(c)

The foregoing sections establish that the Commission ought to disregard Bell Atlantic's proposal because it is a merely a promise of future action, because it was submitted too late in the day for full comment and due consideration, and because it is unsupported by the SBC/Ameritech merger conditions it selectively adopts. Nevertheless, if the Commission should take up the proposal on its merits, the Commission should conclude that the proposal, even if implemented, is

inadequate to satisfy the nondiscrimination requirements of section 271. Under the circumstances, AT&T can only identify and begin to address some of the legal and practical reasons why that is so. But even this preliminary analysis is sufficient to demonstrate the inadequacies of Bell Atlantic's proposal.

A. Bell Atlantic's Proposal Does Not Address Loop Information And Provisioning Issues That Underlie DOJ's Concern

The record is replete with evidence of Bell Atlantic's poor performance in provisioning access to unbundled loops for DSL service. The comments of numerous CLECs and the DOJ's Evaluation set forth the basic problems in substantial detail. *See, e.g.*, DOJ Eval. at 23-28. Since then, numerous *ex parte* presentations have served only to confirm Bell Atlantic's continuing inability to provide CLECs with nondiscriminatory access. *See infra*.

Merely creating a data affiliate will not improve this performance. Specifically, it will not provide CLECs with the electronic access to the pre-ordering information they need to offer their services effectively, it will not improve Bell Atlantic's untimely performance in confirming or provisioning CLEC orders, and it will not ensure that Bell Atlantic installs loops correctly. *Cf.* DOJ Eval. at 24-25. That is particularly true of Bell Atlantic's proposed data affiliate, since it refuses to commit to the SBC/Ameritech OSS parity conditions, yet nowhere explains how Bell Atlantic would treat CLECs versus its new affiliate with respect to these crucial issues.[6] In fact, it is plain that Bell Atlantic and its affiliate would retain an enormous competitive advantage over CLECs as a result of superior access both to loop information and loop provisioning.

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[6] Indeed, even if Bell Atlantic were to promise that its data affiliate would be treated identically to CLECs in all OSS-related respects, that would not excuse Bell Atlantic from its obligation to provide CLECs and its affiliate with a commercially reasonable level of service far superior to what Bell Atlantic now offers. See 47 U.S.C. § 271(c)(3).

1. **Loop information**: Bell Atlantic's current automated loop qualification database does not include many types of loop information that CLECs need in order to provide competing xDSL services. A CLEC cannot determine whether it can provide an individual customer with a specific type of xDSL service (e.g., ADSL, SDSL) unless it has many different kinds of information about the customer's loop, including the loop's working length (without bridged taps), the presence of Digital Loop Carrier or load coils on the line, and the presence and length of bridged taps. This information is not contained in Bell Atlantic's automated loop database. Instead, that database -- which was specifically designed to serve the needs of Bell Atlantic's ADSL "Infospeed" service -- indicates only whether the loop is "qualified" for Infospeed (a yes/no indicator) and the total metallic loop length (including bridged taps).

Thus, Bell Atlantic's automated loop qualification database is sufficient only for a CLEC that will provide the equivalent of Bell Atlantic's ADSL Infospeed service and use the same technical parameters as Bell Atlantic uses for its service. For the many CLECs that want to offer a differentiated and competitive xDSL service, the loop qualification database designed by Bell Atlantic is less useful: they often must submit a manual loop qualification request or an engineering query request to Bell Atlantic to determine whether the existing loop meets the technical requirements of the xDSL service they offer. Compared to the automated information that is immediately available to Bell Atlantic sales representatives for Infospeed, both types of CLEC requests create delay and added costs for CLECs.[7] Thus, because Bell Atlantic has

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[7] A manual loop qualification will cost either $18.64 or $ 12.11 and is returned within 2 business days. An engineering query request will cost either $ 37.10 or $ 34.19 and is not returned for 3 business days. Based upon a recent ALJ ruling, these costs reflect a 70% reduction off the rates Bell Atlantic had proposed. The exact price will not be clarified until receipt of the ALJ's written order.

already designed its loop database in a manner that meets its own needs (or those of any new subsidiary) – but not necessarily those of competing providers – its failure to commit to providing CLECs with nondiscriminatory access to loop information will perpetuate Bell Atlantic's unfair, discriminatory advantage in the marketplace.

The parties participating in the New York collaborative have attempted to address the issue of loop qualification information, but the issues have not yet been resolved, and it appears there is not a consensus between Bell Atlantic and the CLECs on this issue. Consequently, it is likely that it will not be resolved until the New York PSC issues a ruling at a future time. Thus, no one can yet determine whether CLECs will be able to obtain critical loop qualification information in a timely and efficient manner.

Beyond this example, Bell Atlantic's proposal also fails to address numerous other critical requirements, such as: (1) how the affiliate will receive loop qualification information, (2) whether the affiliate will offer a range of xDSL services or only Bell Atlantic's current ADSL Infospeed service, and (3) how, if at all, CLECs will be protected from the threat of Bell Atlantic developing and expanding upon its automated loop database in ways that will favor its affiliate's services over services of CLECs. Indeed, Bell Atlantic's affiliate proposal raises serious unanswered concerns that Bell Atlantic will use this affiliate to justify service or geographic limitations that, although facially nondiscriminatory, will favor the affiliate because of its particular business plans.[8]

Accordingly, there are numerous issues to be resolved before the advanced services market is truly open to robust competition to all providers. Bell Atlantic's advanced-services

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[8] As only a single example, Bell Atlantic's current proposal for expanding its automated database is to add new data fields to the loop information database only as new central offices are qualified. Thus, Bell Atlantic is in a position to select where geographical expansion of xDSL will occur based on its affiliate's own expansion plans.

subsidiary proposal, by excluding all reference to these subjects, does nothing to improve that picture.[9]

2. **Loop Provisioning:** Second, Bell Atlantic's data affiliate proposal also fails to address -- and could even exacerbate -- a significant competitive threat to nascent competition for voice services stemming from the unequal access to loop provisioning.

The Commission's recent Line Sharing Order[10] recognizes that there is growing demand by residential and small business customers for xDSL-based and similar data services, and that it is most economical for such customers to receive data service over the same loop that they use to receive voice service. Indeed, the Commission explicitly found that a CLEC would be significantly impaired if it could compete only by selling a second line to a customer. *Id.* ¶ 25. Currently, Bell Atlantic is the only carrier in New York that can provide a retail customer with local voice service and advanced data services over a single loop. Bell Atlantic currently makes its xDSL-based service, Infospeed, available throughout most of the New York City area, which represents a major portion of the lines in the state.

This provides Bell Atlantic with a huge competitive advantage, not merely for data services, but for voice services as well. As a preliminary matter, Bell Atlantic has not even fully implemented those obligations that are necessary for CLECs to provide competing data services

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[9] Notably, it would not be sufficient merely to require Bell Atlantic to adopt the 4 additional SBC/Ameritech merger conditions that it is currently unwilling to meet. As noted earlier, those conditions are inadequate to prevent discrimination and, by their express terms, can have no precedential effect. Having been designed to address the specific public interest harms in the merger proceeding, the conditions do not even attempt to address many of the issues discussed above that are presented because of Bell Atlantic's unique systems.

[10] Third Report and Order, In the Matters of Deployment of Wireline Service Offering Advanced Telecommunications Capability, et al., CC Docket No. 98-147 (Dec. 9, 1999) ("Line Sharing Order").

using a *second*, separate loop. That was made clear in the initial comments of numerous CLECs and in the DOJ evaluation. And it has been confirmed in subsequent *ex parte* presentations, which show that, if anything, Bell Atlantic's performance has become worse.[11]

For example, CLECs engaged in the voluntary testing with Bell Atlantic as part of the collaborative process being conducted by the New York PSC reported, at the November 17, 1999, collaborative session, that Bell Atlantic had failed to meet its testing due dates for well over half of their orders, and that of those lines tested only about 70% were accepted as good, so that Bell Atlantic's actual rate of installing good loops on time for these CLECs was well below 50%. Similarly, in a December 6, 1999 *ex parte*, NorthPoint submitted evidence that Bell Atlantic failed to engage in joint testing over 50% of the time during the first half of November, 1999, and that working loops were delivered less than 30% of the time.[12]

These data confirm that Bell Atlantic provisioning of xDSL loops fails to meet its checklist obligations. In fact, Bell Atlantic has itself asserted that it should provision at least 85% of xDSL loops on time now, and up to 95% of the time by the third quarter of 2000.[13] The CLECs' data discussed above shows that Bell Atlantic falls well short of that 85% standard, which itself is

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[11] This post-reply-comment data is relevant and should be considered if the Commission decides to abandon the complete-when-filed rule in connection with Bell Atlantic's data affiliate proposal.

[12] Letter from Ruth Milkman to Magalie R. Salas (Dec. 6, 1999) ("Northpoint *ex parte*").

[13] Bell Atlantic stated this at the December 14, 1999 collaborative session. In a December 10, 1999, letter submitted by Randal Milch, Esq. on behalf of Bell Atlantic to Lawrence Malone, Esq., General Counsel of the New York PSC, in connection with the state 271 proceeding, Mr. Milch reported that Bell Atlantic commits to recommend that a missed appointment metric for xDSL be added to the critical measures reported in the Amended Performance Assurance Plan. Regarding this metric for missed appointments, Bell Atlantic stated "Although BA-NY believes that a parity-based standard for these submetrics would be appropriate, given the evolving nature of the DSL process BA-NY will recommend to the C2C collaborative than absolute standard for

unsatisfactory. In addition, Bell Atlantic's own data presented at the December 14, 1999 collaborative session shows that it does not even meet its own proposed standards. Bell Atlantic's own submission shows that it has never provisioned loops on time even as much as 75% of the time, that only 68% were completed on time during the most recent reported week's performance (for the week ending December 10, 1999), and that fewer than 64% of loops were completed on time over the most recent five-week period (weeks ending November 11, 1999 through December 10, 1999). And Bell Atlantic's data have been shown consistently to underreport its actual failure rate.

Bell Atlantic's proposal to create an advanced-services affiliate contains no provisions that attempt to set forth how Bell Atlantic will remedy its current inability to provide CLECs with essential xDSL capabilities on time at acceptable rates. Notably, the proposal fails to detail the loop provisioning processes it will follow with the affiliate (once the transition period is completed), and does not commit to the OSS parity conditions in the SBC/Ameritech Merger Order.[14] It is clear, however, that Bell Atlantic's affiliate will not face the same poor performance experienced by the xDSL CLECs, because the affiliate will offer Infospeed, which is provisioned by Bell Atlantic on the same line that is already used by the customer for voice service.

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these PR-4 submetrics be set at 85% for performance during the first quarter of 2000, 90% for performance during the second quarter, and 95% thereafter."

[14] Nor does Bell Atlantic's proposal commit to any particular performance measurements, making it impossible to evaluate whether CLECs will be able to compare their own loop provisioning results with those of Bell Atlantic's. Notably, Bell Atlantic declined to commit to the performance measurement obligations contained in the SBC/Ameritech Merger Order, App. C, ¶¶ 23-25. At the New York Carrier to Carrier proceeding, Bell Atlantic argued that the appropriate parity measurement for xDSL loops is Bell Atlantic's performance with respect to secondary residential POTS line. This position underscores Bell Atlantic's inability and unwillingness to provision xDSL loops within the same time frames that it provisions Infospeed service, which does not require the installation of a second line.

Conversely, notwithstanding the FCC's recent line sharing order, line sharing is currently not an option for most CLECs. Instead, these CLECs must go through the time consuming, discriminatory and costly process of having Bell Atlantic provision a second line in order to provide their xDSL service.

This key difference points up a crucial deficiency in Bell Atlantic's proposal. Bell Atlantic has not established, much less demonstrated the full and nondiscriminatory implementation of, the arrangements necessary to accommodate line sharing by CLECs with Bell Atlantic, or voluntary line sharing between a data CLEC and a CLEC providing voice service using UNEs obtained from Bell Atlantic.[15] These arrangements are critical to effective competition. As the Commission has recognized, operational issues must be resolved before line sharing can become practically available. Although these issues are addressable, effective competition between data CLECs and the proposed Bell Atlantic data affiliate cannot begin until they have been addressed.

A non-exhaustive list of important operational issues associated with line sharing includes: (1) establishment of non-discriminatory loop qualification information access, loop conditioning, and spectrum management procedures; (2) agreement regarding responsibility for deployment of necessary splitters; (3) support for in-office wiring to connect the advanced services equipment and facilities to operational (or even newly installed) local voice loops; (4) definition of maintenance procedures for jointly used lines; and (5) test access for the data CLEC enabling it to

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[15] Bell Atlantic should not be heard to argue that it is not required to implement immediately some of the relevant obligations imposed by the Commission's UNE Remand Order and the Line Sharing Order, for two reasons. First, as the data herein and the rest of the record clearly show, Bell Atlantic has failed to comply with many other obligations that are effective today. Second, allowing Bell Atlantic to provide long distance service while it retains market power over CLECs' ability to provide local voice service is not consistent with the public interest. Competition cannot be effectively served unless Bell Atlantic provides nondiscriminatory support for line sharing regardless of which carrier provides customers' local voice service or advanced data service.

sectionalize troubles on the high frequency portion of the loop. In addition, clear performance measurements must be established to assure the quality, timeliness and accuracy of the essential support mechanisms for DSL loops and to support meaningful and self-enforcing consequences for failure to provide competition-sustaining performance. None of this is in place today, and Bell Atlantic's proposal does nothing to change that.

As a result, Bell Atlantic alone can take advantage of the efficiencies inherent in line sharing and provide both voice and data services over the same loop. This is because only Bell Atlantic can take advantage of existing technology to split aggregated voice-and-data traffic on a DSL-equipped loop and route that traffic appropriately to its circuit and packet switches, respectively. In contrast, even though line sharing is technically feasible and CLECs should eventually be able to derive comparable benefits from it, line sharing is simply not yet available to CLECs. Thus, CLECs that want to offer only data services in conjunction with Bell Atlantic's local voice services cannot compete against Bell Atlantic's integrated Infospeed offer unless -- unlike Infospeed -- they incur the costs for an entire loop.

Similarly, there is no process yet in place that would enable two CLECs to share a loop so that one could provide voice service using UNE-P (or resold Bell Atlantic service) and the other provide data service to the same customer. Critically, if Bell Atlantic would only make available to CLECs the same frequency splitting capabilities it already provides to itself in conjunction with Infospeed, these competitive impediments could be eliminated. Nevertheless, Bell Atlantic's separate subsidiary proposal fails to address any of these significant competitive disparities.[16]

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[16] In addition to the operational issues described above, there are today no explicit requirements that ILECs support similar arrangements between voice and data CLECs (cite Line Sharing Order). While it is clear that such arrangements would have great potential to further both the deployment of advanced service to all residential and business customers -- and that they

Unless and until satisfactory arrangements have been concluded and implemented, CLECs obviously will be unable to provide data services that can compete efficiently with Bell Atlantic's Infospeed when Bell Atlantic is the provider of the customer's local voice service.

Furthermore, even assuming that the operational issues described above are promptly implemented (and there is no assurance that this will happen), competition for voice service will remain in jeopardy absent additional remedial action. Broadband service offerings such as Infospeed provide incumbent LECs with a "powerful way to retain and attract customers in an increasingly competitive market."[17] But some of these ways to "retain" customers are plainly illegitimate and anticompetitive. Indeed, SBC, another RBOC that, like Bell Atlantic, has begun widescale deployment of broadband service, has already begun telling its xDSL customers who choose a UNE-P-based competing voice service that it will cancel their xDSL services unless they retain their SBC-provided local voice service. See Attachment 1 (customer letter). Incumbent LECs such as Bell Atlantic and SBC moreover, will undoubtedly (although wrongly) claim that such competition-inhibiting practices are permitted, if not required, by the Commission's Line Sharing Order (¶ 72).

These practices are patently anticompetitive. There is simply no way, at present, that CLECs such as AT&T who are pursuing broad local market entry for voice services will simultaneously be in a position to deploy advanced services assets to permit competition with an

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would also provide a strong impetus for voice competition -- no BOC is likely to support such pro-competitive activities, especially after it obtains section 271 relief. However, because the support processes needed to permit customers full choice among voice carriers should be highly analogous (if not identical) to the support procedures that must be developed to support the line sharing already ordered by the Commission, there is no justification to deny voice carriers access to such processes coincident with an ILEC's fulfillment of its other line sharing obligations.

[17] SBC Press Release, "SBC Launches $6 Billion Broadband Initiative," Oct. 18, 1999.

integrated voice/data offer from Bell Atlantic, because customers who want such an offer would have to buy two lines to meet their needs, one for voice service and another for their data service. The result is that customers who desire to retain or receive xDSL service will have no alternative but to retain Bell Atlantic as their voice provider, even though the Commission has found that these are two distinct services that are "technologically and operationally distinct." Line Sharing Order ¶ 56. This produces the mirror image of the condition that the Line Sharing Order (*id.*) sought to eliminate, i.e., residential and small business customers would need to forego their current xDSL provider (Bell Atlantic) in order to subscribe to the CLEC's voice service, "which robs consumers of market choices." If Bell Atlantic's application to provide long distance service is granted, moreover, then customers who desire one-stop shopping for local voice, data and long distance service in New York will have only one alternative: Bell Atlantic. Granting Bell Atlantic's application in these circumstances could not possibly be consistent with the public interest.

But these concerns are not "limited" to the public interest; they implicate the competitive checklist as well. Section 251(d)(2) requires incumbent LECs to provide UNEs to any requesting carrier that would otherwise be impaired "in providing the services it seeks to offer." Section 251(c)(3) requires that access to such UNEs be provided on "rates, terms and conditions that are just, reasonable and nondiscriminatory." Serious questions would arise under both of these provisions if Bell Atlantic were permitted to require customers who are interested in a UNE-P-based voice service to terminate or forego an xDSL-based offering from Bell Atlantic. In that circumstance, requesting carriers that are only able to provide voice service would be impaired in providing "the services they seek to offer." Contrary to the Act, moreover, such carriers would

not be receiving access to UNEs on terms and conditions that are just and reasonable if the customers of their voice service are required to terminate an xDSL service "that is otherwise technologically and operationally distinct."[18] The "separate affiliate" proposal does not address much less resolve these concerns; indeed, it heightens them. Bell Atlantic appears to assume that its data affiliate would not be deemed an incumbent LEC, and would therefore not be subject to the duties imposed by Section 251(c). If that were the case, however, a CLEC that wanted to compete with Bell Atlantic for customers who wish to receive both voice and data services over the same loop would also be unable to resell Bell Atlantic's xDSL-based service.[19] Thus if the Bell Atlantic data affiliate were to be treated as a non-ILEC, CLECs that seek to use UNE-P for voice services could be completely foreclosed from offering a data option for their customers. The Commission should not countenance such a result. *See* Part IV.B., *infra*.

Most fundamentally for AT&T and other competitors who intend to provide local service using UNEs obtained from Bell Atlantic, the only viable alternative would appear to be enter into a line sharing arrangement with Bell Atlantic's data affiliate, in which the CLEC would agree to share spectrum with the affiliate on the same terms that data CLECs can share such spectrum with Bell Atlantic when it provides the voice service. Yet nothing in Bell Atlantic's proposal would require its affiliate to do so. And no one would expect the affiliate to enter into a "voluntary" line

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[18] Line Sharing Order ¶ 56. The Line Sharing Order (¶ 26 n.47) "note[s] that the issue of whether the voiceband meets the definition of a network element that must be unbundled pursuant to sections 251(d)(2) and (c)(3) was not before the Commission in [that] proceeding." However, the Line Sharing Order does not provide, and AT&T is not aware of, any explanation how the Commission could conclude that the high frequency portion of the loop satisfies the Act's definition of a network element, while the voiceband portion does not.

[19] It should also be noted that resale of the data service places the CLEC at an economic disadvantage, because it would be paying for the full cost of the loop through the UNE-P (or

sharing arrangement that would result in the migration of voice traffic from its parent to a competitor.[20]

In this respect, Bell Atlantic's proposal to address the "discrimination" concerns by establishing a separate affiliate to provide data service is deeply ironic as well as bad public policy. If the Bell Atlantic data affiliate were truly operating on an arms length basis with Bell Atlantic, then a customer's choice of underlying voice service provider should be immaterial, and the existing xDSL service could and should be readily deliverable, either independently or in conjunction with the customer's chosen voice service provider. The fact that Bell Atlantic's proposal says nothing about its affiliate entering into line sharing arrangements with other CLECs underscores the likelihood that its proposal will perpetuate, not reduce, discrimination.

B. The Proposed Bell Atlantic Affiliate Will Not Operate Sufficiently Independently Of Bell Atlantic To Avoid Being Deemed A Successor Or Assign of Bell Atlantic

Finally, a condition of Bell Atlantic's proposal is that its data affiliate presumptively would not be considered a "successor or assign" of Bell Atlantic, but would be treated as a CLEC, and therefore would be excused from complying with the resale and unbundling obligations of section 251(c). See SBC/Ameritech Merger Order, App. C, ¶ 3 & n.4. It is abundantly clear that Bell Atlantic's meager proposed separation conditions do not begin to make the showing that would be needed to justify a finding that the data affiliate will be sufficiently separate from Bell Atlantic

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resale) charges for the voice service and also paying for the portion of the loop costs reflected in the price of the data service.

[20] As a wholly owned subsidiary, the affiliate would have neither the incentive nor the obligation to maximize profits at Bell Atlantic's expense. Its sole allegiance and fiduciary duty would be to Bell Atlantic. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984) ("A parent and its wholly owned subsidiary have a complete unity of purpose").

that it could properly be deemed not to be subject to section 251(c) as a "successor or assign" to Bell Atlantic. 47 U.S.C. § 251(h).

Section 251(h) broadly defines "incumbent local exchange carrier" to include any entity that becomes a "successor or assign" of such carriers. 47 U.S.C. § 251(h)(1). The Commission also has sweeping authority to treat "comparable" local exchange carriers as ILECs. *Id.* § 251(h)(2). Congress clearly intended the unique restrictions and obligations applicable to incumbent LECs to be applied in a sufficiently flexible manner to accomplish the 1996 Act's core purpose of opening local markets to competition. Permitting an ILEC to escape its fundamental obligations by adopting insubstantial changes in its corporate form is thus fundamentally inconsistent with section 251(h) and with the purposes of the Act. AT&T addressed the scope of section 251(h) and the degree of separation necessary for an ILEC affiliate to be regulated as a "CLEC" in its pleadings on the Commission's pending Section 706 NPRM and in its filings concerning the SBC/Ameritech merger conditions. Excerpts from those documents are attached to this *ex parte*, and are incorporated herein by reference.[21]

Bell Atlantic's December 10th letter proposes to create an advanced services affiliate by adopting a truncated version of the SBC/Ameritech merger conditions. Those conditions, in turn, were derived from an abridged version of the separation and nondiscrimination provisions Congress imposed on BOC's interLATA services affiliates in section 272. Bell Atlantic thus proposes terms that are twice-removed from that section. Yet, as AT&T has shown at length in

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[21] See Attachment 2 (excerpt of AT&T Section 706 NPRM Comments, CC Docket 98-147, Sept. 25, 1998); Attachment 3 (excerpt of AT&T Section 706 NPRM Reply Comments, CC Docket 98-147, Oct. 16, 1998); Attachment 4 (excerpt of Comments of AT&T Corp on Proposed SBC/Ameritech Conditions, CC Docket 98-141, July 19, 1999); and Attachment 5 (AT&T *Ex Parte* Letter re Revised SBC/Ameritech Conditions, CC Docket 98-141, Sept. 15, 1999).

prior Commission filings, see Attachments 2-5, there is no evidence in section 272 or elsewhere in the Act that Congress intended that provision to be a statutory safe harbor that would guide RBOCs to the creation of entities that would enable them to evade their obligations under section 251(c). Therefore, an ILEC affiliate, including one that provides advanced services, must be deemed a successor or assign to the ILEC under section 251(h) unless it complies not only with the separation, nondiscrimination, and disclosure obligations imposed by section 272, but with additional conditions necessary to establish that it is truly no longer a successor or assign of its parent.

Bell Atlantic has not come close to making this showing. Indeed, Bell Atlantic's proposed affiliate would not even begin to comply with the requirements of section 272, let alone satisfy the higher standard that properly should apply. Given the limited time allowed for comments on Bell Atlantic's proposal, AT&T cannot provide a comprehensive analysis of the detailed merger conditions imposed on SBC/Ameritech and the requirements of section 272. But even a preliminary examination reveals many ways in which the merger conditions fall far short of ensuring that the separate data affiliate will comply even with section 272.[22]

First, the SBC/Ameritech Order expressly exempted SBC/Ameritech from complying with certain subsections of section 272, and provided that even those sections which it did incorporate by reference could be disregarded to the extent they were inconsistent with the conditions. See

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[22] Bell Atlantic's December 10th letter is silent (as it is on so many crucial points) as to whether it contends that an advanced services affiliate that complied with the limited set of conditions Bell Atlantic proposes could provide in-region interLATA services. Section 272 unequivocally provides that a BOC may not originate any interLATA telecommunications service other than those specifically enumerated in section 272(a)(2)(B), unless it complies with the separation and nondiscrimination requirements imposed by that section. See also 47 U.S.C. § 271(d)(3)(B). A BOC "advanced services affiliate" thus plainly may not provide xDSL services on an interLATA basis unless it complies with the full panoply of section 272 requirements.

SBC/Ameritech Merger Order, App. C, ¶ 3 (affiliate need only comply with subsections 272(b), (c), (e), and (g), "except to the extent those provisions are inconsistent with the provisions of this Paragraph," to presumptively escape being a "successor or assign").

Second, the conditions would sanction conduct that squarely violates section 272, as described below.

Sharing of operation, installation, and maintenance ("OI&M"): Bell Atlantic's affiliate proposal promises to breach a core component of section 272 – the prohibition on sharing operation, installation, and maintenance ("OI&M") functions. Section 272(b)(1) requires affiliates to "operate independently" of a BOC. The Commission's Non-Accounting Safeguards Order ruled that this provision imposes independent substantive requirements that, among other things, preclude a BOC and its section 272 affiliate from "performing operating, installation, and maintenance functions" for each other's facilities.[23] That order went on to observe that "allowing the same individuals to perform such core [OI&M] functions on the facilities of both entities would create substantial opportunities for improper cost allocation . . . . Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services *would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors. Id.* ¶ 163 (emphasis added). Despite these unequivocal findings, the merger conditions that Bell Atlantic wishes to follow clearly would permit it to share OI&M services with its advanced-services affiliates, subject only to the limitation that such services are (in *some* cases) to be made

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[23] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (released Dec. 24, 1996), ¶ 157 ("Non-Accounting Safeguards Order").

available to CLECs on a nondiscriminatory basis.[24] SBC/Ameritech Merger Order, App. C, ¶¶ 3-4. At bottom, the proposed OI&M services between Bell Atlantic and its affiliate necessary lead to such business entanglement that they are inherently discriminatory. Because the merger conditions would permit far more integration between Bell Atlantic and its advanced services affiliate than is permitted under section 272, Bell Atlantic's proposal improperly seeks to permit its affiliate to escape its obligations under section 251(c).

The SBC/Ameritech Merger Order attempted to explain the Commission's decision to permit SBC/Ameritech to share OI&M functions with its advanced services affiliate. However, that explanation, which covers only a single paragraph, does not even purport to address the fundamental problem identified in the Non-Accounting Safeguards Order -- the fact that OI&M sharing "would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." The SBC/Ameritech Merger Order explained the Commission's decision to allow OI&M sharing as follows (¶ 473):

> Although the conditions permit SBC/Ameritech and its affiliate to share operation, installation, and maintenance (OI&M) services, we do not find that such sharing will confer upon the affiliate an unfair advantage in the provision of advanced services. We reach this conclusion for several reasons. First, although sharing of these services is permitted, the conditions also provide that such services will be made available to unaffiliated entities on a nondiscriminatory basis. As such, there should be no difference in price or quality between the OI&M services provided to the affiliate vis-a-vis unaffiliated entities. Second, although we recognize that in the section 272 context the Commission prohibited the sharing of these functions, we do not find such a prohibition to be required in the advanced services context. For example, because the loop is used to provide both telephone exchange services and advanced services, greater network integration is required in the provision of

[24] Under its proposal, Bell Atlantic could provide some forms of OI&M on an exclusive basis. See, e.g., SBC/Ameritech Merger Order, App. C, ¶ 3.c(3) (BOC may provide "network planning, engineering, design, and assignment services" to affiliate on an exclusive basis for 6 months); *id.* ¶ 3.h (BOC may receive and process trouble reports and perform trouble isolation for affiliate on an exclusive basis for 12 months).

> advanced services than in the provision of long distance services. Given this, allowing the SBC/Ameritech incumbent to share these services with its affiliate, on the same basis that it shares them with unaffiliated entities, will permit greater economies of scope and enable the affiliate to be a more efficient competitor. Third, as described above, the merger conditions require a rigorous internal compliance program and annual audits. We believe that these mechanisms will adequately deter SBC/Ameritech from favoring its affiliate in the provision of OI&M services (as well as other services).

None of the three reasons the order offered bears at all on the rationale underlying the Commission's earlier finding that a BOC affiliate would inevitably have superior access to OI&M services provided by the BOC. The SBC/Ameritech Merger Order first pointed to the merger conditions' imposition of a nondiscrimination requirement. But section 272(c) itself imposes what the Commission has called an "unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities,"[25] and the Non-Accounting Safeguards Order nevertheless found that prohibition could not adequately protect CLECs. And the Non-Accounting Safeguards Order's finding came in spite of section 272's strong transaction disclosure and audit safeguards, which the Bell Atlantic proposal omits entirely. The SBC/Ameritech Merger Order simply offers no reasoned basis to presume that the SBC/Ameritech conditions' nondiscrimination provisions can adequately protect competition when section 272(c) cannot do so.

The second ground on which the SBC/Ameritech Merger Order sought to permit SBC/Ameritech to share OI&M was that "greater network integration is required in the provision of advanced services than in the provision of long distance services" and that therefore OI&M sharing will permit a BOC to enjoy "greater economies of scope." This rationale, however, also utterly fails to address the fundamental holding of the Non-Accounting Safeguards Order. A BOC's opportunity to achieve economies of scope bears no relation to its ability to discriminate against

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[25] Non-Accounting Safeguards Order, ¶ 197.

unaffiliated entities. Indeed, to the extent that advanced services require greater "network integration" than do interLATA voice services (a point the SBC/Ameritech Merger Order fails to support in any meaningful fashion),[26] then it stands to reason that the ability of a BOC to discriminate in favor of its affiliate when providing OI&M services would be even harder to detect and deter,[27] and would pose an even greater threat to competition.

Third, the SBC/Ameritech Merger Order's attempt to rely on the conditions' so-called "rigorous internal compliance program and annual audits" is plainly inapposite to Bell Atlantic's proposal, which does not incorporate those elements of the conditions (assuming, *arguendo*, that those safeguards could otherwise overcome what the Non-Accounting Safeguards Order found were intractable problems of detection and deterrence). The SBC/Ameritech Merger Order also conspicuously fails to make any detailed comparisons of the section 272 requirements and the merger conditions in this respect, and it is far from self-evident that the 1996 Act's transaction disclosure and audit provisions, coupled with the Commission's rules interpreting section 272, are any less "rigorous" than the SBC/Ameritech conditions -- particularly given that the merger conditions' audit standards have yet to even be drafted.

Nondiscrimination: While section 272(c) unconditionally prohibits discrimination "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards," Bell Atlantic's proposal would permit it to discriminate in favor of its affiliate in

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[26] The sole grounds the SBC/Ameritech Merger Order offers to support its conclusion that advanced services require "greater network integration" than interLATA voice telecommunications is the fact that the local loop "is used to provide both telephone exchange services and advanced services." Of course, the loop is also used for both local exchange services and interLATA voice services, so this purported "distinction" is simply irrelevant.

[27] Again, detection and deterrence under Bell Atlantic's proposal are rendered all the more difficult by the absence of transaction disclosure or audit requirements.

several ways. For example, paragraph 3 of the merger conditions contains numerous exceptions that would permit Bell Atlantic to discriminate in favor of its affiliate for six months in the transfer of advanced services equipment, facilities, and personnel; in the use of names and trademarks; and for a full year in the provision of certain maintenance and repair reports and services. See SBC/Ameritech Merger Order, App. C, ¶¶ 3.e, 3.f, 3.h. Paragraph 3.e of the conditions is especially troubling, as it would allow Bell Atlantic to transfer "any Advanced Services Equipment, including supporting facilities and personnel" on an exclusive basis. This last provision would violate not only section 272(c),[28] but also the Commission's own rule against transfers of "unique facilities."[29] While a particular piece of Advanced Services Equipment, such as a DSLAM or a splitter, might be available for purchase elsewhere, when such equipment is transferred *in situ* -- e.g., already collocated in a BOC's central office and interconnected with that BOC's facilities, it is by any reasonable measure "unique," as a CLEC can replicate it, if at all, only after going through a months-long collocation process.

Transaction disclosure: In addition, the merger conditions expressly waive the transaction disclosure requirements of section 272(b)(5). See SBC/Ameritech Merger Order, App. C, ¶ 3(i). Instead of demanding disclosure of each transaction between Bell Atlantic and its advanced services affiliate, the merger conditions would permit Bell Atlantic merely to disclose the terms of an interconnection agreement that it "negotiates" with its wholly-owned affiliate. Because the affiliate and Bell Atlantic have a complete unity of interests, no interconnection

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[28] See Non-Accounting Safeguards Order, ¶ 160 (section 272(c)(1) dictates that "a section 272 affiliate and its interLATA competitors will have to follow the same procedures when obtaining services and facilities from a BOC").

agreement between them can possibly be the product of true arms' length negotiation, nor does the affiliate have any incentive or duty to maximize its own profitability or efficiency.[30] Moreover, the affiliate (unlike CLECs) will have no reason to seek to precisely specify the terms on which it will receive goods or services from Bell Atlantic.[31] These conditions' reliance on an interconnection agreement will provide both CLECs and the Commission with far less information than would the more stringent requirements of section 272(b)(5), and will substantially undermine the ability of CLECs to determine whether they are receiving goods, services, and information from Bell Atlantic on the same terms and conditions as is the new affiliate.

Joint marketing: The scope of the so-called "joint marketing" permitted by Paragraph 3.a of the SBC/Ameritech conditions is broader than that permitted by section 272(g), because the conditions permit the BOC and its affiliate to share, on an exclusive basis, "customer care" functions. Paragraph 3.a expressly provides that "customer care" includes functions that occur after a sale is made. But no reasonable construction of the term "marketing" includes post-sale activities. Dictionary definitions of "marketing" limit the term to "activity involved in the moving

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[29] See Non-Accounting Safeguards Order, ¶ 218 ("[W]e find that if a BOC were to decide to transfer ownership of a unique facility . . . to its section 272 affiliate, it must ensure that the transfer takes place in an open and nondiscriminatory manner.")

[30] "In the parent and wholly-owned subsidiary context . . . the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and the parent's shareholders." D. Block, N. Barton, & S. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Directors, at 185 (4th ed., Prentice Hall 1994) (citations omitted).

[31] Although paragraph 5.a of the SBC/Ameritech conditions states that the interconnection agreement between a BOC and its affiliate "shall be sufficiently detailed to permit telecommunications carriers to exercise effectively their 'pick-and-choose" rights under 47 U.S.C. § 252(i)," nothing in the conditions specifies the level of detail that will be required, and it is unclear how this largely hortatory provision could be enforced.

of goods from the producer to the consumer," and do not refer to activities that occur after goods reach a purchaser's hands.[32]

Sunset: All aspects of Bell Atlantic's proposal would sunset on July 1, 2003 (Bell Atlantic Dec. 10th Letter, Att. ¶ 13). In contrast, the sunset provisions of section 272 expressly exclude section 272(e), which is *not* subject to sunset. 47 U.S.C. § 272(f)(1) & (2).

Audit requirements: Finally, by refusing to commit even to all of the conditions in the SBC/Ameritech merger order, Bell Atlantic has distanced itself even further from section 272. For example, the merger conditions exempt SBC/Ameritech from section 272(d)'s audit requirements, but paragraphs 66 and 67 of the conditions at least imposed some audit obligations on SBC/Ameritech. Because Bell Atlantic will commit only to the conditions in paragraphs 1-14, however, it will escape any audit obligation whatsoever, thus further insulating the transactions between the affiliate and parent from any meaningful oversight.[33]

These examples are not exhaustive, but they demonstrate that Bell Atlantic is not willing to commit to sufficient separation safeguards between itself and its proposed data affiliate. The Commission has already determined that BOCs are inherently incapable of creating nondiscriminatory access to operation, installation, and maintenance functions, and the absence of any transactional disclosure or audit requirements will only increase Bell Atlantic's ability to discriminate. Coupled with the absence of any meaningful commitments to OSS parity, Bell

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32 Webster's New World Dictionary (1984).

33 In addition to the issues noted above, the SBC/Ameritech merger conditions employ a definition of "advanced services" that is radically different from that the Commission adopted earlier this year in a proceeding that expressly sought to define "advanced services" for purposes of administering the portions of the Act in which that term appears. AT&T explained this issue in its previously-filed comments on the advanced services portion of the SBC/Ameritech conditions, which are included with this *ex parte* as Attachment 4.

Atlantic's proposal cannot be viewed as a serious attempt to create an entity that could fairly be deemed a separate CLEC, rather than a successor or assign of Bell Atlantic. These inadequacies provide yet another reason for this Commission to disregard Bell Atlantic's belated data-affiliate proposal.

CONCLUSION

For the reasons stated above, the Commission should give no weight to Bell Atlantic's belated expression of willingness to establish an advanced services affiliate.